

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, EX REL,))
and PATRICK LOUGHREN,)
)
Plaintiffs)
)
-VS-) CA No. 03-11699-PBS
) Pages 1 - 21
UNUMPROVIDENT CORPORATION,)
)
Defendant)

JURY TRIAL - DAY NINETEEN
JURY DELIBERATIONS AND VERDICT

BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 19
Boston, Massachusetts
October 22, 2008, 8:55 a.m.

DEBRA M. JOYCE and LEE A. MARZILLI
OFFICIAL COURT REPORTERS
United States District Court
1 Courthouse Way, Room 3205
Boston, MA 02210
(617)345-6787

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2 A P P E A R A N C E S:

3 PETER B. KRUPP, ESQ., Lurie & Krupp, LLP,
4 One McKinley Square, Boston, Massachusetts, 02109, for the
Plaintiff, United States of America, Ex Rel.

5 KIT A. PIERSON, ESQ., BRENT N. RUSHFORTH, ESQ.,
6 STUART M. RENNERT, ESQ., and DAVID YOUNG, ESQ.,
Heller Ehrman, LLP, 1717 Rhode Island Avenue N.W.,
7 Washington, D.C., 20036, for the Plaintiff, Patrick
Loughren.

8 GERALDINE G. SANCHEZ, ESQ., MARK E. PORADA, ESQ.,
and WILLIAM J. KAYATTA, JR., and GAVIN G. MCCARTHY, ESQ.,
9 Pierce Atwood, 1 Monument Square, Portland, Maine, 04101,
for the Defendant, UnumProvident Corporation.

10
11 ALSO PRESENT: LAURA KILMARTIN, ESQ.,
12 UnumProvident Corporate counsel.
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1 P R O C E E D I N G S

2 THE COURT: Did you read the most recent status
3 report?

4 MR. PIERSON: We did, your Honor.

5 THE COURT: So my question for you all is -- in a
6 way, it's a report of a final deadlock on one of the claims,
7 but also progress on two additional ones. So -- and a
8 resolution of three. So I'm trying to figure out whether
9 it's premature to give the Allen charge on the one. I think
10 it probably is, because if they're deadlocked on the
11 remaining two, I'd have to give it a second time.

12 MR. PIERSON: That seems right, your Honor. I
13 mean -- I think both sides agree these guys are working real
14 hard there; they're making progress. It's a complex case,
15 we all know that. My point of view would be let them work,
16 you don't want to give the Allen charge twice.

17 THE COURT: I have it here if anyone wants to see
18 it. I print it out from the Pattern 1st Circuit jury
19 instructions, and that's what I would intend to give. I
20 think it would be geared towards criminal, so I'd have to
21 make that adjustment, but otherwise, that's what I would
22 give.

23 All right. So I'll bring them in, send them out.

24 MR. KAYATTA: The only thing to ponder about is
25 the suggestion you made yesterday before we throw in the

1 full-blown Allen charge, given how many instructions and how
2 many messages, whether we did sort of two-minute
3 mini-supplemental closing on materiality.

4 THE COURT: Think about that.

5 MR. PIERSON: We'll think about it.

6 THE COURT: In conjunction with an Allen.

7 I don't know, in my view, if everyone agrees, it's
8 appeal proof, and at this point, this makes the fifth
9 time -- fourth or fifth time I've received a request for
10 supplemental instructions or some signal of difficulty with
11 materiality. An issue, where in fact, was not a focus of
12 anyone's closing arguments or much of a focus during our
13 instruction charge. It was not something -- we all focused
14 on all sorts of other things. So it was not a focus of
15 closings -- did either of you even mention it? I was trying
16 to mention it.

17 MR. PIERSON: Yeah, we discussed it, I know I
18 discussed it, I know Bill did too. I went back, reread it,
19 and it was discussed.

20 We'll think about it. I think it would be
21 important for both sides to consent to it, otherwise there
22 would be an appeal issue.

23 THE COURT: Absolutely. I would never do it
24 without both sides' consent.

25 Let's bring the jury in.

1 (Discussion off the record.)

2 THE COURT: While you're here, you might as well
3 be here, it shows you care and you're not out there laboring
4 in the fields.

5 MR. KAYATTA: We'd be happy to join them.

6 THE COURT: Good point. As we all know, this
7 doesn't resolve the case. The question is, if you wanted to
8 talk to them afterward, if -- as long as you waived any
9 appeal rights.

10 MR. PIERSON: Why don't we talk about that after a
11 break.

12 THE COURT: Although I don't know if I have a room
13 big enough.

14 Just off the record.

15 (Discussion off the record.)

16 (Jury entered the courtroom.)

17 THE COURT: Thank you. We read your status
18 report. I don't think it's asking a question at this point.
19 I think everyone here is very much impressed at hard you're
20 working, and it is, indeed, a complex case. So thank you
21 very much and we'll hear from you when you want us to.

22 Thank you.

23 Anybody speak about the case? Anything in the
24 press?

25 Okay, good. Thank you.

1 (Jury left the courtroom.)

2 THE COURT: Okay.

3 MR. KAYATTA: Will we wait for us to initiate or
4 is there a period of time when we --

5 THE COURT: Goodbye. I don't think -- they
6 expressly said to Robert they were not going to be asking a
7 question, they just wanted us to know where they were. So
8 they had basically an hour of deliberation Thursday, by the
9 time the juror got here, probably only about three hours of
10 deliberation on Friday. I would say from 9:15 until quarter
11 of five yesterday. So, I mean, they've, at this point,
12 rounding it, their third real day of deliberations. So
13 they're making headway, and what I'd love you all -- so the
14 three things on your agenda, if there can be agreement on,
15 one: Whether you want a supplemental closing argument.
16 Maybe what I would do is take the verdict on the ones that
17 they have -- on the one that they don't have, maybe give you
18 a supplemental charge on it. That's the thought process I
19 have, so it doesn't screw up in any way the ones that
20 they've got the verdict on. The second would be whether or
21 not you want to talk to them afterwards, and the third,
22 which is I think -- you need to at some point if there's --
23 set up a day for a Daubert hearing on the statistics.

24 The question really is, if it comes back fully for
25 plaintiff, it goes one way; if it goes fully for defendant,

1 the question is whether we need it. If there's a mixed
2 verdict, I don't know what to do.

3 MR. KAYATTA: And then do you have any sense of --
4 if we hear nothing from them this morning, they go through
5 lunch, then we just wait until we get another message from
6 them of a deadlock?

7 THE COURT: Yes. At that point, I would want to
8 know whether you want to do a little supplemental closing.
9 I think it's a good idea, actually. I didn't imagine
10 materiality would be a holdup, I thought it would be other
11 things, like knowing. Maybe that's a holdup, too.

12 MR. PIERSON: Would it be possible to get a copy
13 of the written instructions that was from the end of the
14 day? I don't think we got the final printout.

15 THE CLERK: We could do that, sure.

16 THE COURT: You all know the standard Allen
17 charge, right?

18 MR. PIERSON: Yes.

19 THE COURT: I'm just going to change the burden of
20 proof, basically.

21 MR. KAYATTA: And the number of zeros.

22 THE COURT: Yeah, yeah. Okay.

23 (Recess taken at 9:25 a.m.)

24 (Resumed, 12:50 p.m.)

25 THE COURT: So you've had an opportunity to see

1 the most recent note. They have decided five of the six,
2 and that "We're firmly hung on the sixth case."

3 So the question is, I still think the protocol is
4 to read them an Allen charge. I think I let you go -- they
5 just received their lunch about a half an hour ago, bring
6 them in now, have you leave for an hour, and if they say
7 they're hung, I'm going to take a partial verdict. Does
8 anyone have a problem with this approach?

9 MR. PIERSON: I think that's reasonable, your
10 Honor. I think it might make sense to let them deliberate
11 all day, unless they get to the point where they say --

12 THE COURT: Well, I'm going to give them the Allen
13 charge, and the next time they come back, it's almost viewed
14 as abusive at this point. We'll see what they say, see what
15 they say.

16 All right, so I've sort of modified the criminal
17 Allen charge. Did anyone have a problem on it?

18 MR. PIERSON: I only had one comment on it, your
19 Honor. I think it basically looks fine as balanced. Again,
20 what it tries to do is the very balance, of course, and not
21 sort of tilted on one side. The last paragraph on the
22 second page talks about the burden of proof and basically
23 says, "This is what happens if the plaintiff doesn't meet
24 their burden of proof." And just in the spirit of all of
25 this being balanced both ways, if we could add a last

1 sentence that says, "If, however, the preponderance of the
2 evidence shows that the plaintiff has met his burden, the
3 defendant must be found liable," which is just the flip side
4 of what the preceding says, so it's not just pointing in one
5 direction.

6 THE COURT: Okay.

7 MR. KAYATTA: The point that I noticed, your
8 Honor, on the first full paragraph on Page 2, I think you
9 just inadvertently left out out of the standard charge. It
10 actually begins, "On the other hand," comma.

11 THE COURT: I know. If you want me to --

12 MR. KAYATTA: I think what that is, is that's a
13 way of saying those two paragraphs have equal standing.

14 THE COURT: All right.

15 MR. PIERSON: That seems reasonable.

16 MR. KAYATTA: And then adding this additional
17 sentence at the bottom, I mean, the Allen charge formation
18 goes back to at least 1987 in this circuit, and I don't know
19 why we would add language that's not in the charge that's
20 been approved.

21 THE COURT: Well, why don't I just say, "It's also
22 your duty to --" well, I don't know, it makes sense to do it
23 both ways.

24 MR. KAYATTA: I mean, this charge has been through
25 the First Circuit three times. It's been through --

1 THE COURT: Yes, but it's a reasonable doubt
2 standard is what it is.

3 MR. KAYATTA: Yes, it is, but the formulation, in
4 my experience, is always just the standard has changed, but
5 we don't start adding changes. Why create an issue when we
6 could be guaranteed there would be no issue at all?

7 MR. PIERSON: What's the issue? It's just making
8 a parallel. Your Honor, can I approach and just so you have
9 the language that I proposed?

10 (Pause.)

11 MR. KAYATTA: Yes, particularly where the burden
12 of proof language was actually -- that was stressed by the
13 circuit in Flannery that that was one of the required
14 elements of an Allen charge.

15 MR. PIERSON: Well, all we're asking is that it be
16 parallel, that it not point in one direction.

17 THE COURT: All I'm going to say is, "The
18 plaintiff has a burden to establish, with respect to each
19 claim, each essential element, and to establish that the
20 essential element is more likely true than not true. If
21 plaintiff has met his burden, you must find in his favor,
22 but if with respect to any element or claim you're not
23 persuaded," that's how I'm going to end it.

24 MR. PIERSON: That's fine, your Honor.

25 MR. KAYATTA: And, again, that cuts back on why

1 the circuit says you include burden of proof in the Allen
2 charge as one of the elements. It's basically telling them,
3 this is the tie breaker that you can use; and now, by
4 rewriting it that way, it doesn't offer them that
5 assistance.

6 THE COURT: That's right. "If plaintiff has met
7 his burden, you must find in his favor on any element or
8 claim. . .you must find in his favor on that element or
9 claim. But if with respect to any element or claim you are
10 unpersuaded by a preponderance of the evidence, the
11 defendant must be found not liable." I think that just
12 makes this parallel.

13 MR. PIERSON: That's fine, your Honor.

14 THE COURT: That's what I'm going to do.

15 All right, bring them in. Then you're going to
16 leave for an hour, but you've got to come back.

17 MR. PIERSON: Okay.

18 THE COURT: What have you decided on -- I take it
19 no one said anything on closing arguments?

20 MR. PIERSON: Given where we are, your Honor, I
21 can't see any reason to do that.

22 THE COURT: Do you agree?

23 MR. KAYATTA: I think it requires agreement.

24 THE COURT: What do you want to do with respect to
25 going back and seeing the jury?

1 MR. PIERSON: I think we are disinclined to do
2 that.

3 MR. KAYATTA: I think we would probably be
4 inclined to do it, but I think perhaps after we see the
5 verdict, counsel should talk again.

6 MR. PIERSON: That's fair, that's fair.

7 THE COURT: Well, I'm not holding them. They're
8 going to disappear.

9 MR. KAYATTA: And are we giving them any sense of
10 the time to report back to you the status this afternoon?

11 THE COURT: No.

12 MR. KAYATTA: Okay.

13 THE COURT: I don't even think I'm going to hand
14 this to them. I think it's. . .

15 MR. KAYATTA: Why wouldn't we treat it like all
16 the other instructions?

17 THE COURT: Because it's easy.

18 THE CLERK: All rise for the jury.

19 (Jury enters the courtroom.)

20 THE COURT: Please be seated. So I read your most
21 recent note, and I give you this charge:

22 I am going to instruct you to go back and resume
23 your deliberations, and let me explain why. In trials,
24 absolute certainty can neither be expected nor attained.
25 You should consider that you are selected in the same manner

1 and from the same source as any future jury would be
2 selected. There is no reason to suppose that this case
3 would ever be submitted to men and women more intelligent,
4 more impartial or more competent to decide it than you, or
5 that more or clearer evidence could ever be produced in the
6 future. Thus, it is your duty to decide the case, if you
7 can conscientiously do so without violence to your
8 individual judgment.

9 The verdict to which a juror agrees must, of
10 course, be his or her own verdict, the result of his or her
11 own convictions, and not a mere acquiescence in the
12 conclusion of his or her fellow jurors. Yet, in order to
13 bring seven minds, seven of you to a unanimous result, you
14 must examine the questions submitted to you with an open
15 mind and with proper regard for, and deference to, the
16 opinions of the other jurors.

17 In conferring together, you ought to pay proper
18 respect to each other's opinions, and ought to listen with
19 an open mind to being convinced by each other's arguments.
20 Thus, where there is disagreement, jurors favoring the
21 defendant should consider whether the plaintiff has, in
22 fact, established that each essential element is more likely
23 true than not true when the plaintiff has made such an
24 impression upon the minds of the other equally honest and
25 intelligent jurors who have heard the same evidence with the

1 same degree of attention and with the same desire to arrive
2 at the truth under the sanctions of the same oath.

3 On the other hand, jurors favoring plaintiff ought
4 seriously to ask themselves whether they should distrust the
5 weight or sufficiency of the evidence which fails to
6 persuade the minds of the other jurors that the plaintiff
7 has established that each essential element is more likely
8 true than not true.

9 Not only should jurors in the minority reexamine
10 their positions, but jurors in the majority should do so
11 also, to see whether they have given careful consideration
12 and sufficient weight to the evidence that has favorably
13 impressed the persons in disagreement with them.

14 Burden of proof is a legal tool for helping you
15 decide. The law imposes upon the plaintiff the burden of
16 proof. The plaintiff has the burden to establish, with
17 respect to each claim, each essential element, and to
18 establish that the essential element is more likely true
19 than not true. If plaintiff has not met his burden on any
20 element or claim, you must find in his favor on that element
21 or claim. But if with respect to any element or claim you
22 are unpersuaded by a preponderance of the evidence, the
23 defendant must be found not liable.

24 It is your duty to decide the case, if you can
25 conscientiously do so without violence to your individual

1 judgment. It is also your duty to return a verdict on all
2 claims as to which all of you agree, even if you cannot
3 agree on all claims. But if you cannot agree, it is your
4 right to fail to agree.

5 So I instruct you to go back, resume your
6 deliberations. I'm telling the lawyers they can leave for
7 an hour to go for lunch, and then they will return.

8 Okay, thank you.

9 THE CLERK: All rise for the jury.

10 (Jury excused.)

11 MR. KAYATTA: I might have been the only one, and
12 I'm not sure whether there's a double negative in one of the
13 sentences you read, the sentence that you inserted at the
14 plaintiff's request.

15 MR. PIERSON: I think that may -- we'd have to
16 read the transcript, but I thought as I was reading along
17 here, it sounded like it may have come out wrong.

18 THE COURT: It's possible. "If plaintiff has met
19 his burden on any element, you must find in his favor on
20 that element or claim." You think I said "not"?

21 MR. PIERSON: I think it came out wrong. We'd
22 have to look at the transcript, but --

23 THE COURT: Well, let me put it this way. Well,
24 can you go back and check?

25 MR. KAYATTA: I would suggest, like every other

1 instruction, we simply have that typed up correctly, give it
2 to them, and then if we're wrong, there's no problem.

3 THE COURT: Let's just look at it right now.

4 (Transcript read back by the Reporter.)

5 THE COURT: All right, I did throw that in. So
6 why don't we just X that out and then send that in to the
7 jury.

8 MR. PIERSON: That seems fine. It might make
9 sense to communicate to them that they're getting something
10 in writing because they're going to start deliberating on
11 this now.

12 THE COURT: I'm sure they understood what I meant.

13 MR. KAYATTA: That's good for you.

14 MR. PIERSON: Well, we want to get it right, so
15 that's fine, let's send them in something in writing.

16 (Discussion off the record.)

17 THE COURT: So that will be sent in.

18 MR. PIERSON: Okay, thank you.

19 THE COURT: So you should just note for the record
20 that we've sent in the charge.

21 MR. PIERSON: You wanted us back at 2:00 o'clock?

22 THE COURT: Yes.

23 MR. KRUPP: We'll be in the building.

24 MR. PORADA: Could we get a copy of the charge?

25 THE CLERK: The revised one?

1 MR. PORADA: Yes.

2 THE COURT: Now, let me just say this: Is there
3 anyone who needs to be notified before this? The U.S.
4 Attorney's office asked to be notified. I guess
5 Mr. Loughren is here. Anyone from Unum?

6 MR. KAYATTA: A trade notification to the
7 U.S. Attorney with an explanation of where --

8 THE COURT: I don't know. So he's here, the
9 company's here.

10 MR. KRUPP: Judge, can we wait to see what will be
11 sent in after it gets retyped?

12 THE COURT: Why?

13 MR. KRUPP: Because we feel like we missed, you
14 know, whether there was a missing word or not.

15 THE COURT: Sure.

16 MR. KRUPP: Thank you.

17 (A recess was taken, 1:07 p.m.)

18 (Charge shown to attorneys.)

19 MR. PIERSON: That's fine.

20 MR. KAYATTA: That's fine.

21 THE COURT: Okay.

22 MR. PIERSON: Thank you.

23 THE COURT: All right.

24 (A recess was taken, 1:15 p.m.)

25 (Resumed, 3:40 p.m.)

1 THE COURT: As you know, you've seen that they're
2 still deadlocked on that one claim, so I'm going to take the
3 verdict now.

4 MR. PIERSON: I understand.

5 THE COURT: All right. You all saw the note,
6 right?

7 MR. KAYATTA: Yes.

8 MR. PIERSON: We did, your Honor.

9 THE CLERK: All rise for the jury.

10 (Jury enters the courtroom.)

11 THE CLERK: Members of the jury, please remain
12 standing. Everybody else, you may be seated.

13 THE COURT: You may inquire.

14 THE CLERK: Mr. Foreman, has the jury reached a
15 unanimous verdict?

16 THE FOREMAN: We have.

17 THE CLERK: Would you please return your verdict
18 to the Court.

19 (Foreman complies.)

20 THE COURT: All right.

21 THE CLERK: Mr. Foreman, Question 1, did plaintiff
22 prove that Unum violated the False Claims Act with respect
23 to Claimant Jennine?

24 THE FOREMAN: Yes.

25 THE CLERK: Question 2, did plaintiff prove that

1 Unum violated the False Claims Act with respect to
2 Claimant Jessica?

3 THE CLERK: The jury could not reach a unanimous
4 verdict.

5 THE CLERK: Question 3, did plaintiff prove that
6 Unum violated the False Claims Act with respect to
7 Claimant Linda, A, claim dated October 26, 2004?

8 THE FOREMAN: No.

9 THE CLERK: B, claim dated February 20, 2008?

10 THE FOREMAN: No.

11 THE CLERK: Question 4, did plaintiff prove that
12 Unum violated the False Claims Act with respect to
13 Claimant George?

14 THE FOREMAN: Yes.

15 THE CLERK: Question No. 5, did plaintiff prove
16 that Unum violated the False Claims Act with respect to
17 Claimant Randall?

18 THE FOREMAN: No.

19 THE CLERK: With regard to, if you answered "yes"
20 to any of the questions above, what amount of damages,
21 Mr. Foreperson?

22 THE CLERK: \$425 for proven false claim.

23 THE CLERK: So say you, Mr. Foreperson? So say
24 you, all members of the jury on your verdict?

25 THE FOREMAN: Yes.

1 THE JURY: Yes.

2 THE COURT: Thank you. You may be seated.

3 On behalf of everyone here, I want to thank you
4 for your really extended service on this very important
5 case. I make it a practice to go back and talk to jurors
6 about the process, to answer any questions that you might
7 have. You have gone above and beyond the call of duty, so I
8 will certainly not be insulted if any of you want to leave
9 as soon as we finish the proceedings here.

10 As I mentioned, you can talk about the case with
11 anyone, but please respect the confidential discussions of
12 your fellow and sister jurors. So at this point, I will
13 stand in recess.

14 THE CLERK: All rise for the jury.

15 (Jury excused.)

16 THE COURT: What I suggest is that the question is
17 whether or not you want right now to come up with a date for
18 a Daubert hearing or whether you want to talk?

19 MR. PIERSON: I think we're prepared to come up
20 with a date, your Honor. What we were going to propose was
21 sometime after the election so that we can sort of catch our
22 breath, and anytime after that, I think our expert is pretty
23 flexible.

24 MR. KAYATTA: We've been trying to come up with a
25 date for the last month so that we could check on our

1 expert's schedule and check on our schedule.

2 THE COURT: Well, why don't you within a week let
3 me know.

4 MR. PIERSON: That's fine.

5 THE COURT: Come up with a series of dates that
6 you can all do it. Okay? Thank you very much.

7 MR. PIERSON: Thank you.

8 MR. KAYATTA: Thank you.

9 (Adjourned, 3:45)

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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

We, Debra M. Joyce and Lee A. Marzilli, do hereby
certify that the foregoing transcript, Pages 1 through 21
inclusive, was recorded by us stenographically at the time
and place aforesaid in Civil Action No. 03-11699-PBS, United
States of America, Ex Rel V. UnumProvident Corporation, et
al, and thereafter by us reduced to typewriting and is a
true and accurate record of the proceedings.

In witness whereof we have hereunto set our hand
this 2nd day of May, 2009.

/s/ Debra M. Joyce

/s/ Lee A. Marzilli

DEBRA M. JOYCE
LEE A. MARZILLI
OFFICIAL COURT REPORTERS